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In The
SUPREME COURT OF THE UNITED STATES
October Term - 1965

No. ___

John V. Holmes, et al, Petitioners
vs.
Jay Eddy, et al, Respondents — No. 9511

John V. Holmes, et al, Petitioners
vs.
United States of America, et al, Respondents — No. 9543

- - - -

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

- - - -

Petitioners pray that a Writ of Certiorari issue to review the consolidated decision of the United States Court of Appeals for the Fourth Circuit entered in the above entitled civil causes on January 18, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, printed in the Appendix A hereto, pp. 1a-9a, is reported at 341 F 2d 477, affirming per curiam the district court opinions below cited.

The opinion of the district court in Holmes, et al vs. Eddy, et al, is printed in the No. 9511-CA 4, in appellants appendix at pp. 7-12 and is reported at Section 91,277 of CCH Fed. Sec. Law Reports. The opinion of the district court in Holmes, et al vs. United States, et al, printed in the No. 9543-CA 4 appellants appendix at pp. 34-37, is reported at CCH Fed. Sec. Law Reports Sec. 91,346.

JURISDICTION

The decision of the Court of Appeals for the Fourth Circuit was entered on January 18, 1965 and the Order of the Fourth Circuit denying Petition for Re-Hearing was entered on April 5, 1965.

On July 8, 1965, an Order was entered in the Supreme Court of the United States, signed by Associate Justice Arthur J. Goldberg of the Supreme Court, extending the time for petitioners to file for writ of certiorari to and including August 1, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether Securities and Exchange Commission agents are "expressly authorized by the Securities Exchange Acts" (opinion 9543, CA 4 appendix pp. 36) to violate their own rules governing their own conduct. (Rules 122 ('33 Act); 0-4 ('34 Act) and Rule 26(c), SEC Rules of Practice (since superseded)). (See Appendix hereto B, for rules and CFR).

2. Whether SEC agents "official duties" (CA opinion appendix B, pp. 8-9) includes operational level concoction of fake or hoax photos (No. 9543 appendix pp. 23-25) and their unlawful disclosure in violation of SEC rules is "expressly authorized by the Securities and Exchange Acts" as found and affirmed,

3. Whether SEC agents "official duties" include violation of their rules in making unlawful disclosures and allegations to private attorneys thereby precipitating private lawsuits, causing great loss (No. 9543, appendix, complaint at pp. 4-6, affidavit pp. 18-19) and if such is expressly "authorized by the Securities and Exchange Acts" as found.

4. Whether SEC agents "official duties" "expressly authorized" include the widespread rule violations set forth in No. 9543, appendix, complaint at pp. 14-15, and affidavit at pp. 21-29, said rule violations by SEC agents being admitted by the SEC respondents.

5. Whether, in a summary judgment action, the courts properly decided a material fact controversy (showing of the confidential auto and tire plans in 1961-62, or non-showing) by adopting the SEC view as against the petitioners affidavits, No. 9543 appendix, complaint pp. 5-9, affidavit, pp. 19-20.

6. Whether the district court and the Court of Appeals properly extended the Barr vs. Matteo, 360 U.S. 564, and NY Times vs. Sullivan, 376 U.S. 254, doctrines to grant absolute immunity to operational level SEC agents and private parties in malicious meddling and admitted violations of SEC rules, as well as the violations of the groundless untruth prohibitions of the 33 and 34 Securities Acts.

7. Whether the courts below properly extended and broadened the operational level, as distinguished from discretionary level immunities of the Federal Tort Claims Act in excepting the U.S. from suit in 9543 on various torts and reckless or worse conduct not previously excepted.

8. Whether in a summary action the courts can properly ignore the specifics of 95% of a complaint and lengthy affidavit, deliver a generalized opinion that gives little inkling of what was actually before the courts (No. 9543, Holmes, et al vs. U.S., et al). Further, furnishing little guidance of what issues were decided by the courts, and leaving little proper basis for guidance for res judicata in later cases, i.e. Holmes, vs. U.S., 231 F.Supp. 971, appeal pending No. 22092, CA 5, Holmes vs. Cary, 234 F.Supp. 23, appeal pending No. 22098, CA 5, and other cases pending in the 10th and D.C. Circuits brought by both the petitioners and the Securities and Exchange Commission.

STATUTES INVOLVED

The Statutory provisions involved are the Federal Tort Claims Act (28 U.S.C. 2674); SEC Rules at 17 CFR 230.122, 17 CFR 240.0-4, and 17 CFR 201.26(c) (since superseded), and, in relation to the Eddy case, the Securities Act of 1933, Sec. 17 and Securities Exchange Act, Rule 10(b)(5).

REASONS FOR GRANTING THE WRIT

In addition to the questions presented above, both cases, but particularly the later, involve the question of whether investigations by civil agencies are to be conducted in the discreet and businesslike methods of the FBI and Secret Service, or will investigations degenerate in commercial and personal "wrecking" operation, whereby "washerwoman" activities, "reckless or worse" cause needless personal and commercial ruination. Are the Securities Exchange Commission rules binding or may they be flaunted with impunity by the over-eager members of the staff?

The district court opinion in Holmes vs. U.S. did uphold the validity of the rules in stating:

"S.E.C. regulations forbid agents and employees to disclose or divulge the contents of information or documents obtained by them in the course of an investigation unless and until it becomes a matter of public record or the Commission authorizes the disclosure." 9th Cir. appendix, pp. 36.

As the petitioners affidavit made clear, quoting SEC agents testimony, no disclosures had been authorized by the Commission.

But, three paragraphs later the same court did find that

"...nothing was done by the (SEC) defendants that is not expressly authorized by the Securities and Exchange Acts."

Thus, while the SEC defended on the grounds they were simply immune from restraint, and by their own quoted words had not authorized the admitted violations, the court found the violations were "authorized".

Thus, the question posed is whether the SEC is correct in defending on the grounds of immunity, admitting unauthorized acts, or the court correct in "authorizing" the violations SEC did not authorize.

The anti-disclosure rules of the SEC have been repeatedly upheld in various proceedings, holding the rules valid, including In re Timberg, CA-6, 1955, 226 F 2d 501.

The respondents contend their unlawful concoction and disclosure of the fake hoax photo was their "duty", whereas petitioners claim citizens should be protected from governmental fake photo hoaxes manufactured at government expense.

The Barr-Sullivan doctrines are extended herein far beyond previous limits; all-level governmental privilege and private privilege, with the previous malice rules thrown to the winds.

The present rulings appear to have gone far beyond present Supreme Court rulings, see New York Times vs. Sullivan - The Scope of A Privilege, Va. Law Review Jan. 1965, wherein it was said:

"It must be emphasized that Sullivan sets a strict constitutional test of malice sufficient to overcome the privilege, namely, "knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. (pg. 114).

and, further,

"Also, since plaintiff corporation was not a public official, application of the Sullivan privilege is certainly not mandated by the holding of the Supreme Court." (pg. 112).

The cases herein extend the publication privilege to operational level persons having no discretionary publication duties, and to private parties.

Herein Commission respondents admit violation of their own rules, more serious than the "reckless or worse" standards of Kelley vs. Dunne, 344 F 2d 129-135 (1965) which case stands on all fours in opposition to the doctrines below.

Petitioners believe the decisions below are in conflict with many Supreme Court rulings protecting citizens from arbitrary governmental actions, as set forth in the printed record from below, including Larson vs. Domestic etc, 337 U.S. 682 at 695

actions "...conflict with the terms of his (governmental officers) valid statutory authority".

Reference below to Jones vs. Kennedy, 121 F 2d 40, cert. den. seems inapplicable as nowhere have the petitioners sought to restrain the Commission from carrying out a lawful investigation, issuing valid press releases, or the forwarding of information to authorities, as did the Jones case.
Petitioners have attempted to adhere to a brief petition; attention is called to their full position in the printed record for the Fourth Circuit.

CONCLUSION

As this is the first of the many Hydramotive automobile cases to reach the Supreme Court from the four circuits where proceedings are going forward the past six since 1961 petitioners seek consideration of their cause and tender apologies for their inexperience and training lack at law.

Respectfully submitted,

John V. Holmes, pro se
Durward E. Willis, pro se
Solo Tire Company
Hydramotive Corporation
Hydramotive Manufacturing Corp.
Hydramotive Engineering Corp.
American Uranium Company
Science Investors, Inc.
Data Electronics, Inc.
Hydramotive Financial Corp.
Willis Acceptance Corporation

Address:
Love Valley
North Carolina

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9511

John V. Holmes, et al, appellants,
vs.
Jay Eddy, et al, appellees.

No. 9543

John V. Holmes, et al, appellants
vs.
United States of America, et al, appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE.
J. B. CRAVEN, Jr., DISTRICT JUDGE.

(Argued October 8, 1964 - Decided January 18, 1965).

Before SOBELOFF, Chief Judge, BRYAN, Circuit Judge, and GORDON, District Judge.

PER CURIAM:

As both of these cases, i.e. Nos. 9511 and 9543, arose from substantially the same facts, and were argued at the same time before the Court, the cases are consolidated for decision by the Court.

The plaintiffs named in both of the subject actions were engaged either directly or indirectly in the development of an automobile and tire. In order to promote their endeavors, the plaintiffs sought to market stock. The Securities and Exchange Commission (hereinafter referred to as S.E.C. or Commission) in September, 1961, authorized its staff to conduct an investigation to determine whether the plaintiffs herein and others were violating the registration and anti-fraud provisions of the Federal Securities laws in the sale of the stock. During the course of this investigation, Jay Eddy, a stock broker in the employ of Harris, Upham & Company, voluntarily informed the

Commission that he had received a letter from Hydramotive Corporation through the mails and that he felt the Company's venture might "bilk the public". Specifically, in this respect, Jay Eddy mailed to the S.E.C. the letter received by him from Hydramotive Corporation and prior to mailing the letter he wrote thereon the following: "This company looks like an attempt to bilk the public via the securities market--it has a smell similar to all such."

The Commission requested the defendant Eddy to execute an affidavit as evidence that the alleged misleading letter or literature was being sent through the mails in connection with the sale of stock. The S.E.C. thereafter on December 12, 1961, brought a suit in the United States District Court for the Western District of Oklahoma under Section 20(b) of the Securities Act of 1933, as amended, 15 U.S.C. 77t(b), and Section 21(e) of the Securities Exchange Act of 1934, against among others, John V. Holmes, Hydramotive Manufacturing Corporation, Hydramotive Corporation and Durward E. Willis, being four of the plaintiffs named in the suits in this appeal, to enjoin defendants from future sales of unregistered stock and the use of false and misleading sales literature. The letter and affidavit from Jay Eddy, which had been kept confidential prior to the Oklahoma action, were introduced as evidence in the Oklahoma action. The United States District Court for the Western District of Oklahoma granted the relief requested by the S.E.C. and held that there had been a violation of the Federal Securities law, and accordingly, enjoined the sale of the stock. This case is now on appeal and reported at CCH Fed. Sec. L. Rep. Section 91,354(WD Okla).

After the institution of the Oklahoma action, the plaintiffs instituted the suits which are the subject of this appeal in the United States District Court for the Western District of North Carolina.

In one of the subject actions (no. 9511), plaintiffs, Hydramotive Manufacturing Corporation and John V. Holmes, in their complaint filed April 2, 1963, named as defendants the United States Securities and Exchange Commission; William Lucius Cary, Chairman of the Commission; Martin V. Miller, Thomas W. Rae, M. David Hyman, Attorneys employed by the Commission; Walter C. Johnson, Investigator with the Commission; John Doe,

an unknown official of the Commission; Harris, Upham & Co., a securities broker-dealer and Jay Eddy, an employee of Harris, Upham & Co. The complaint seeks (1) injunctive relief permanently restraining the individual defendants from "Further circulation of harmful untruth", (2) $20,000.00 in damages to plaintiff Holmes and (3) $500,000.00 in damages to the plaintiff Hydramotive Manufacturing Corporation. In essence, the allegations of the complaint allege that the defendants have conspired to circulate and have circulated publicly untruths about the plaintiff which constitute an "attractive public nuisance" with consequent damage to the plaintiffs. The District Court upon motion of the defendants granted summary judgment for the defendants.

In the other action (No. 9543), plaintiffs, John V. Holmes, Durward E. Willis, Hydramotive Manufacturing Corporation, Hydramotive Corporation and other corporations of which Holmes or Willis are officers, in their complaint filed May 24, 1963, named as defendants the United States of America; the United States Securities and Exchange Commission; William Lucius Cary, Chairman of the Commission; Manuel F. Cohen, a member of the Commission; Philip Loomis, Jr., General Counsel of the Commission; Irving M. Pollack, Associate Director of the Commission; William M. Green, Regional Administrator of the Commission, J. Cecil Penland, Assistant Administrator of the Commission; Thomas W. Rae, Martin V. Miller, Davis Bliss, M. David Hyman, John Kelly, Attorneys for the Commission, and Walter Johnson, Investigator for the Commission. The complaint seeks (1) injunctive relief permanently restraining the Securities and Exchange Commission and the individual defendants from unlawfully

(a) exceeding their authority,
(b) committing irregularities,
(c) interfering with plaintiffs business,
(d) disclosing confidential information obtained during the investigation of plaintiffs by the Securities and Exchange Commission,

and (2) damages of $22,750,000.00 from the United States of America by reason of wrongful acts of the agents, servants and employees of the Securities and Exchange Commission. The allegations of the complaint in effect state that the defendants, by and through the named individual defendants, unlawfully disclosed and

divulged confidential information that was obtained during an investigation by the Securities and Exchange Commission of the plaintiffs' business and securities practices. The District Court, on motion of the defendants, granted summary judgment for the defendants in this action also.

First, with reference to No. 9511, the plaintiffs in paragraphs 5 and 13 of their complaint allege that the acts of which the plaintiffs complain were committed by the Chairman of the S.E.C. and its employees, who are named defendants, "within the scope of their employment". A careful study of the entire record on appeal reveals nothing that was done by the defendants, except Jay Eddy and Harris, Upham & Company, other than acts wholly within the scope and course of carrying out their official duties as authorized by 15 U.S.C. 77t and 78u in carrying out the investigation of plaintiffs' business. The allegations of plaintiffs' complaint, together with other pertinent portions of the record, bring the plaintiffs' action clearly within the established principle of law that "public officers when acting within the scope of their official authority are immune from suit for damages." John v. Kennedy, DC Cir., 121 F 2d 40, 42, cert. den. 314 U.S. 665, 56 S. Ct. 654, 6 L. Ed. 536 (1941); Barr v. Matteo, 360 U.S. 564, 70 S. Ct. 1335, 3 L. Ed. 2d 1434 (1959); Gregoire v. Biddle, 2 Cir., 177 F. 2d 579, cert. den. 339 U.S. 949, 70 S. Ct. 803, 94 L. Ed. 1363 (1950); Cooper v. O'Connor, D.C. Cir., 99 F. 2d 135, cert den. 305 U.S. 643, 59 S. Ct. 146, 83 L. Ed. 414 (1938); Ove Gustavsson Contracting Co. v. Floete, 2 Cir., 299 F. 2d 655, cert. den., 374 U.S. 827, 83 S. Ct. 1862, 10 L. Ed. 2d 1050 (1962).

In Jones v. Kennedy, supra, the plaintiff instituted suit against members of the Securities and Exchange Commission and several of its employees. As in the subject suits, the precise nature of the claims was not set out clearly by the plaintiff but suggest slander, libel, malicious prosecution and interference with the business relationship of the plaintiff by carrying out investigations, issuing press releases, forwarding information to authorities, etc. The Court, in affirming a decision dismissing the complaint, held that since the acts came within the authorized duties of the defendants the complaint failed to state a

claim upon which relief could be granted.

With reference to the Securities and Exchange Commission as a party defendant, Section 4 of the Securities Exchange Act, 15 U.S.C. 7..d, establishes the Commission as an agency of the United States, and as such government agency, the Commissio.. ma, be sued only in such manner as Congress authorizes. The complaint of the plaintiffs asks for injunctive relief as to the individual defendants only and damages as against all of the defendants, including the S.E.C. As distinguished from having its orders reviewed by the courts, Congress has not consented that the Commission be sued. The plaintiffs assert specific reliance upon the Federal Tort Claims Act to secure money damages against the S.E.C., but it is specifically provided by 2679 of Title 28 of the United States Code that a federal agency is not to be sued thereunder, and in fact the provisions of 28 U.S.C. 2000(a)(h) except the United States from liability under the Federal Tort Claims Act in an action of the type here presented. The S.E.C. cannot be sued eo nomine.

As to the defendant Eddy and/or Harris, Upham & Co., it is clear that the only acts committed by the defendant Eddy in connection with the entire transaction was to mail the letter received from Hydramotive Corporation, with the notations made by him thereon, to the Securities and Exchange Commission, and execute an affidavit to the effect that he received the letter for use by the S.E.C. as evidence in the Oklahoma action. It is not apparent that such action on the part of the defendant Eddy could amount to a defamation of the plaintiffs, in that he, the defendant Eddy as alleged in the complaint, conspired to circulate harmful falsehoods and/or created an attractive public nuisance and/or circulated harmful falsehoods, especially in view of the fact that the letter to the Commission, a federal agency under a statutory duty to protect the public from frauds through stock issues, was treated as confidential and disclosed to no one outside the Commission until the letter along with an affidavit by the defendant Eddy, were filed as evidence in the Oklahoma action. The said affidavit was furnished by request of the S.E.C.

Such being the undisputed facts, the District Court acted properly in allowing the motion of the defendant

Eddy and his employer, Harris, Upham & Co., for summary judgment, inasmuch as no genuine issue of fact existed, but in addition thereto the acts of the defendant Eddy were privileged, his statements having been made public only upon the institution of the Oklahoma action and being relevant to the issue before the Oklahoma Court. As stated in the Borg v. Boas, 9 Cir., 231 F2d 70o ('56)

"The information given to a prosecutor by a private person for the purpose of initiating a prosecution is protected by the same cloak of immunity and cannot be used as a basis for an action for defamation."

Also see Newell on Slander and Libel (2d Edition) 424, at paragraph 27 where it is stated:

"The same doctrine is generally held in the American Courts, with the qualification as to parties, counsel and witnesses, that their statements made in the course of an action be pertinent and material."

For other cases dealing with the principle of immunity in judicial proceedings, see: Jarman v. Offutt, 239 N.C. 468, 80 S.E. 2d 248 (1954); Fowle v. Fowle, 255 N.C. 720, 122 S.E. 2d 722 (1961); Godette v. Gaskill, 151 N.C. 52, 65 S.E. 612 (1909); Bailey v. McGill, 247 N.C. 286, 100 S.E. 2d 360 (1957); Baggett v. Grady, 154 N.C. 632, 70 S.E. 610 (1911); Wall v. Blalock, 245 N.C. 232, 95 S.E. 2d 450 (1956); Ramsey v. Cheek, 109 N.C. 270, 13 S.E. 775 (1891), annot. 54 AIR 2d 1298, 1302, 1305. King v. Hildebrandt, 216 F.S. 314 (S.D.N.Y.)(1963); Sock v. Stecker, 2 Cir., 60 F. 2d 73 (1932); Keeley v. Great Northern Ry. Co., 156 Wis. 181, 145 N.W. 664 (1914); Tsesmelis v. Sinston State Bank, 53 S.W. 2d 461 (Tex. Com. App. 1932); Hager v. Major, 353 Mo. 1166, 186 S.W. 2d 564('45).

In case No. 9543, the plaintiffs named include John V. Holmes and Hydramotive Corporation, both of which were plaintiffs in case 9511. The defendants in case No. 9543 are the United States of America, United States Securities and Exchange Commission, two of the Commission members and several agents and representatives of the Commission. Therefore, deleting Jay Eddy and Harris, Upham & Co. as parties defendant and adding the United States of America and five additional individual defendants representing the S.E.C., the defendants are the same in case No. 9543 as in case No. 9511. The allegations of the complaint in case No. 9543 are to

the effect that the S.E.C. through its agents and employees since approximately September, 1961, have unlawfully interfered with and disparaged the plaintiffs business by disclosing confidential information secured in the process of investigation. Specifically the plaintiffs' business by disclosing confidential information secured in the process of investigation. Specifically the plaintiffs contend that agents of the S.E.C. during the investigation secured from the plaintiffs design drawings of an automobile and tire which the plaintiffs were in the process of developing and promoting, and that the drawings were shown to competitors and others with adverse interest to the plaintiffs. The record reflects that the drawings were secured with reference to the institution of the Oklahome proceedings by the S.E.C.; that the drawings were, without objection on the part of plaintiffs, delivered to the S.E.C. in the course of discovery proceedings in the Oklahoma action; that the drawings were introduced as evidence in the Oklahoma action and no objection made to the introduction thereof and no request made for confidential treatment at the time.

The same principles of law relating to immunity of the defendants in case No. 9543 govern as in case No. 9511 and hence need no reiteration. The discernible claim of the plaintiffs in case No. 9543 is that the Commission, it(s) members and employees, in violation of the rules of the Commission damaged plaintiffs by making public information gathered by the Commission and its employees in the course of investigating plaintiffs' practices and activities in the marketing of stock.

From the complaints in the subject actions, affidavits on the part of the respective parties presented for consideration by the Court in ruling on the respective motions and argument presented, the District Court properly concluded that the drawings complained of were shown only to Commission personnel and a restricted group of engineers, not in fact adverse to plaintiffs' interest, and who by training were qualified to give an expert opinion with regard to the drawings for use in the Oklahoma action; that the drawings are now a matter of public record in the Oklahoma proceeding; that the investigating of the plaintiffs by

the S.E.C. and its agents was carried out in accordance with statutory authority, and the acts of the defendants of which the plaintiffs complain consisted wholly of acts done within the scope and course of carrying out official duties in investigating the plaintiffs' business practices and activities.

Analysis and review of the record of the District Court demonstrates that the appeal in each of the cases is without merit, and accordingly the judgment by the District Court is AFFIRMED.

Affirmed.

Securities Act of 1933

Rule 122 Nondisclosure of Information Obtained in the Course of Examinations and Investigations (17 CFR 230.122)

Information or documents obtained by officers or employees of the Commission in the course of any examination or investigation pursuant to Section 8 (e) or 20(a) shall, unless made a matter of public record, be deemed confidential. Officers and employees are hereby prohibited from making such confidential information or documents or any other non-public records of the Commission available to anone other than a member, officer, or employee of the Commission, unless the Commission authorizes the disclosure of such information or the production of such documents as not being contrary to the public interest. Any officer or employee who is served with a subpoena requiring the disclosure of such information or the production of such documents shall appear in court and, unless the authorization described in the preceeding sentence shall have been given, shall respectfully decline to disclose the information or produce the documents called for, basing his refusal upon this rule. Any officer or employee who is served with such subpoena shall promptly advise the Commission of the service of such subpoena, the nature of the information or documents sough, and any circumstances which may bear upon the desirability of making available such information or documents.

Securities Exchange Act of 1934

Rule 0-4. Nondisclosure of Information Obtained in the Course of Examinations and Investigations. (17 CFR 240.0-4)

Information or documents obtained by officers or employees of the Commission in the course of any examination or investigation pursuant to section 17(a) or 21(a) shall, unless made a matter of public record, be deemed confidential. Officers and employees are hereby prohibited from making such confidential information or documents or any other non-public records of the Commission available to anyone other than a member, officer,

or employee of the Commission, unless the Commission authorizes the disclosure of such information or the production of such documents as not being contrary to the public interest. Any officer or employee who is served with a subpoena requiring the disclosure of such information or the production of such documents shall appear in court and, unless the authorization described in the preceding sentence shall have been given, shall respectfully decline to disclose the information or produce the documents called for, basing his refusal upon this rule. Any officer or employee who is served with such a subpoena shall promptly advise the Commission of the service of such subpoena, the nature of the information or document sought, and any circumstances which may bear upon the desirability of making available such information or documents.

Rules of Practice (SEC)

Rule 26. Confidential Treatment of Certain Matters. (Rescinded April 1, 1964) (17 CFR 201.26(c)

(c) Information obtained in investigations. Information or documents obtained by the Commission in the course of any examination or investigation shall, unless made a matter of public record, be deemed confidential. Officers and employees are hereby prohibited from making such confidential information or documents or any other non-public records of the Commission available to anyone other than a member, officer, or employee of the Commission, unless the Commission authorizes the disclosure of such information or the production of such documents as not being contrary to the public interest. Any officer or employee who is served with a subpoena requiring the disclosure of such information or the production of such documents shall appear in court and, unless the authorization described in the preceding sentence shall have been given, shall respectfully decline to disclose the information or produce the documements called for, basing his refusal upon this rule. Any officer or employee who is served with such subpoena shall promptly advise the Commission of the service of such subpoena, the nature of the information or documents sought

and any circumstances which may bear upon the [illegible] of desirability of making available such information or documents.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 432

JOHN V. HOLMES, ET AL., PETITIONERS

v.

JAY EDDY, SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS (OTHER THAN EDDY AND HARRIS, UPHAM & COMPANY) IN OPPOSITION

On December 12, 1961 the Securities and Exchange Commission instituted an action in the United States District Court for the Western District of Oklahoma to enjoin the petitioners and others from selling unregistered stock and from using false and misleading sales literature, in violation of the federal securities laws. After a trial, the district court entered a permanent injunction. *Securities and Exchange Commis-*

sion v. *Bond and Share Corporation*, 229 F. Supp. 88 (W.D. Okla.), pending on appeal, C.A. 10, No. 7797.

Subsequent to the institution of the Commission's action, the petitioners filed two suits based on the Commission proceedings, in which they sought damages and injunctive relief. The first suit (*Holmes* v. *Eddy*), brought against the Commission, its former chairman, several Commission employees and respondent Eddy and his employer, Harris, Upham & Company (a broker-dealer), charged that the respondents had conspired to and did publicly circulate false statements about the petitioners which constituted an "attractive public nuisance" to their damage (Pet. 3a). Petitioner's principal complaint was that the Commission had attached to its complaint an affidavit by Eddy to which was attached a stock solicitation letter he had received through the mail from petitioner Hydramotive Corporation, on which he had written that "This company looks like an attempt to bilk the public via the securities market—it has a smell similar to all such" (Pet. App. 1a-2a). The affidavit was used in the Commission suit solely to show that petitioners had used the mails in offering securities (Pet. App. 2a). The second suit (*Holmes* v. *United States*), filed against the United States, the Commission, its present and former chairmen and numerous Commission employees, alleged that the respondents had unlawfully disclosed certain confidential design drawings of an automobile and tire that the petitioners were developing and promoting, which design the Commission had obtained during its investigation of petitioners (Pet. App. 3a-4a, 7a).

The Commission introduced the design drawings into evidence in its suit without objection (Pet. App. 7a).

In both cases, the district court granted the defendants' motions for summary judgment (Pet. App. 3a, 4a). The court of appeals affirmed in a single opinion disposing of both cases. It held in *Holmes* v. *Eddy* that, insofar as the government defendants were concerned (Pet. App. 4a),

> A careful study of the entire record on appeal reveals nothing that was done by the defendants, except Jay Eddy and Harris, Upham & Company, other than acts wholly within the scope and course of carrying out their official duties as authorized by 15 U.S.C. 77t and 78u in carrying out the investigation of plaintiffs' business. The allegations of plaintiffs' complaint, together with other pertinent portions of the record, bring the plaintiffs' action clearly within the established principle of law that "public officers when acting within the scope of their official authority are immune from suit for damages."

In *Holmes* v. *United States* it ruled (Pet. App. 8a) that "the acts of the defendants of which the plaintiffs complain consisted wholly of acts done within the scope and course of carrying out official duties in investigating the plaintiffs' business practices and activities."

The decision of the court of appeals affirming the district court's dismissal of both suits was plainly correct, and there is no occasion for further review. The decision represents a proper application of the settled principle that public officers are not subject to

suit for damages based upon acts done within the scope of their authority. *Barr* v. *Matteo*, 360 U.S. 564; *Ove Gustavsson Contracting Co.* v. *Floete*, 299 F. 2d 655 (C.A. 2), certiorari denied, 374 U.S. 827; *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949; *Jones* v. *Kennedy*, 121 F. 2d 40 (C.A.D.C.), certiorari denied, 314 U.S. 665; *Cooper* v. *O'Connor*, 99 F. 2d 135 (C.A.D.C.), certiorari denied, 305 U.S. 643. In *Holmes* v. *Eddy*, as the court of appeals pointed out (Pet. App. 4a), the petitioners themselves alleged in their complaint that the acts of the government respondents upon which the suit rested were done "within the scope of their employment." In *Holmes* v. *United States*, the court below similarly noted (Pet. App. 7a-8a) that the record showed that the drawings involved "were shown only to Commission personnel and a restricted group of engineers * * * who by training were qualified to give an expert opinion with regard to the drawings for use in the [Commission] action"; that the Commission's investigation of the petitioners was made "in accordance with statutory authority"; and that all of the acts which that suit challenged were "done within the scope and course of carrying out official duties * * *." And, since all of these acts by the government respondents were within the scope of their official duties, there was plainly no basis upon which the performance of such acts could be enjoined.

There is no substance to petitioners' contention (Pet. 3, 6) that the decision below conflicts with *New York Times Co.* v. *Sullivan*, 376 U.S. 254. The hold-

ing in that case that a newspaper was immune from liability for defamatory statements made about public officials unless such statements were made with actual malice (376 U.S. at 278-283) is in accord with the principle that the court below applied here. Indeed, the court in the *Times* case specifically analogized the privilege for criticism of official conduct which it there recognized to "the protection accorded a public official when *he* is sued for libel by a private citizen," citing *Barr* v. *Matteo*, *supra* (376 U.S. at 282, italics in original).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

PHILIP A. LOOMIS, JR.,
General Counsel,

WALTER P. NORTH,
Associate General Counsel,
Securities and Exchange Commission.

SEPTEMBER 1965.

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In The
SUPREME COURT OF THE UNITED STATES

Fall Term - 1965
No. 432

John V. Holmes, et al Petitioners

vs.

Jay Eddy, et al, Respondents, No. 9511

United States of America ,,
Respondents, No. 9543

PETITION FOR REHEARING

John V. Holmes, pro se
Durward E. Willis, pro se
Hydramotive Corporation
Hydramotive Manufacturing Corp.
Solo Tire Company, et al

Address for Petitioners:

Love Valley
North Carolina 28677

IN THE SUPREME COURT OF
THE UNITED STATES
October Term - 1965
No. 432

John V. Holmes, et al
Petitioners

vs.

Jay Eddy, et al
Respondents - No. 9511
United States
Respondents - No. 9543

PETITION FOR REHEARING

Citations of Cases	Pages
Greenwell vs. U.S., 336 F2d962	3
Holmes, et al vs. Cary, 234 F.S. 23, ___ F2d ___ (No. 22098, 5Cir	7
(Holmes vs. Eddy, and	1, 4
(Holmes vs. U.S., CCH 91,346, 341,F2d 477	1, 2, 3 4, 5, 6,
Holmes vs. U.S., 231 FS 971, ___ F2d ___, No. 22052, 5th Cir.	4, 5, 7
Hydramotive Mfg. Corp, et al vs. SEC, appealed from SEC vs. Bond and Share, et, 229FS88, 10Cir. No. 7977, 1/3/'66 ___ F2d ___.	5, 6
Kelley vs. Dunne, 344 F2d 129	6
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Pollard vs. U.S., 352 U.S. 354	2
Sherwood vs. U.S. CCH FSLR 91,419	3
U.S. vs. Parrott, No. 830-64, USDC-DC, 12/6/'65, to be rep. ___F.S.___, CCHFSLR___	1, 2, 3, 5, 6, 7.

In The
SUPREME COURT OF THE UNITED STATES
October Term - 1965
No. 432

PETITION FOR REHEARING

Petitioners present their petition for a rehearing of this Court's Order dated October 25, 1965, denying the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit and, in support thereof, respectfully show:

GROUNDS FOR REHEARING

Petitioners believe a supervening conflict of decisions has been created by the opinion of the United States District Court, District of Columbia, in U.S. vs. Parrott, et al, No. 830-64, (Judge Gasch, decided 12/6/'65), to be reported, __F.S.__, CCH F.S.L.R. _____(with appendix A, B, C), final order 12/10/'65, successful plea in bar, case noticed for direct appeal to the Supreme Court of the United States on 1/5/'66. Petitioners herein Holmes and Willis were defendants therein, the Hydramotive Corporation named a "co-conspirator" therein, and all other petitioners have property interests in the issues at stake.

The additional and contradictory findings of U.S. vs. Parrott, supra, have apparently raised the following Constitutional questions, regarding Holmes vs. U.S., et al, 4thCir., No. 9543, CCH SLR (d.c.) 91,346, F2d 341 at 477, contrary to the findings of the Fourth Circuit. (Note 1)

1. Were the petitioners Constitutional rights violated by an unlawful U.S. agents search and seizure of their property, that is, auto and tire plans?

Note 1: Holmes vs. Eddy held SEC and SEC informers immune from law in circulating "harmful falsehood, having, admittedly, no basis in fact".

2. Were the petitioners Constitutional rights, Fifth Amendment, not to be deprived of ... property, (auto and tire plans), "without due process of law" violated by U.S. agents?

3. Were the petitioners Constitutional Sixth Amendment rights, to counsel of choice, violated by U.S. agents, resulting in unlawful taking of property without due process of law?

4. Did U.S. agents damage petitioners through negligent acts as alleged in the No. 9543 complaint?

5. Whether, in view of the supervening law of U.S. vs. Parrott, supra, the petitioners have Constitutional rights at law to suppress and to recover their property, that is, all copies of their auto and tire plans?

6. If petitioners Constitutional rights have been violated by a pattern of U.S. agents conduct, and if U.S. agents have been guilty of negligent acts, are the petitioners entitled to Tort Claims Act damages and judicial restraint of U.S. agents as a matter of law?

In U.S. vs. Parrott, supra, it was held, during the period covered by the No. 9543 complaint and action, that U.S. agents engaged in "purposeful and / or oppressive" (Pollard vs. U.S., 352 U.S. 354) negligent delays while engaged in violation of petitioners direct and indirect property and civil interests and Constitutional rights.

In the Parrott case it was held: ".. it is not necessary to reach the search and seizure issues under the Fourth Amendment, the due process issues under the Fifth Amendment, or the Sixth Amendment speedy trial issues. Were it necessary to reach these constitutional questions, the result would be the same for these defendants have been denied substantial constitutional rights guaranteed under these Amendments. (emphasis added).

In No. 9543, Holmes vs. U.S., et al, the petitioners alleged violation of their Constitutional rights: (j) (jurisdiction) Constitution of the United States, Article III, Sec. 2(4Cir. appendix record,

CCH F.S.I.R. 91,419.

pg. 3, No. 9543) and Amendments 4 and 5 (4Cir. app. rec. pg. 14).

At issue in No 9543 are two sets of auto and tire plans. The first set of plans was taken from the petitioner Willis in Sept. 1961 by SEC; see 4th Cir. app. rec. pg. 5, item IX. In relation to this set of plans, U.S. vs. Parrott, supra, has held:

"SEC... obtained records and papers in the possession of ... Willis."

Further...

"It appears that ... Willis produced such papers and records on threat of having them subpoenaed. They were uncounseled at this time. The absence of counsel militates against any conclusion that they might have waived their constitutional rights. Greenwell v. United States ____ U.S. App. D. C. ___, 336 F. 2d 962, 968.

The second set of auto and tire plans was taken by SEC agents in June 1963, after they had secured a court order. (See note 2 below). As petitioner Holmes stated, affidavit, No. 9543, 4Cir., app. pg. 19-20 (para. 5, 6, 7:

"5. At no time has any party of interest affirmatively agreed to or consented, ... to the public expose of any confidential Hydramotive automobile or Solo tire designs and drawings."

"6. It is true, that, in response to a court order, which the court in question had indicated in advance it was inclined to grant, Durward E. Willis, (and no other) mailed certain drawings to the Commission in June of 1963.

Note 2: Actually the 2nd set of plans was produced after 2 (two) court orders and threatening letter from SEC. The court, in granting the order, did not, of course, know, that the U.S. was "lying in wait" with "oppressive and purposeful" "negligent" delay as found in Parrott. See U.S. vs. Sherwood, "It is not in keeping with our heritage to destroy the image of America, by a policy of lying in wait..." "The United States of America has sufficient power, prestige and facilities to openly indict...." CCH F.S.L.R. 91,419.

"

"7. These drawings, or at least certain of them, were introduced by the Securities and Exchange Commission in a federal court action. Plaintiffs herein, Holmes and Willis, then moved, following this action, to have the drawings sealed, to be opened only upon showing of good cause, on the order of the court, in conformity with certain patent and process legal decisions. This motion has been pending for some time."

The SEC then (Fall 1963) attempted to take the second (or court) set of drawings from the Okla. Court and make them a part of a public record. As said in No. 9543, affidavit, pg. 20, 4Cir. appendix:

"8. Following use of the Hydramotive and Solo drawings as exhibits in that case, the defendant herein (SEC) requested of that court use of all exhibits in an administrative proceeding in Washington, D. C., which would become a public record. The Okla. Court then allowed the Commission use of certain exhibits but specifically refused to allow Hydramotive or Solo drawings, specifications or patent material to leave the care of the Court. (See Ex. A-Order of Judge Fred Daugherty, attached hereto)(orig. record)."

On March 16, 1964, Judge Fred Daugherty, U.S.D.C.-W.D.-Okla. signed an order sealing the second (or court) set of plans. (See Order of Judge Daugherty, attached as appendix A to this petition for rehearing).

Before and after the injunction trial of July 15-20, 1963, the petitioners Holmes and Willis were without counsel. (Note 3).

Note 3: Willis, Holmes and other petitioners were denied their 12/13/'61 counsel through the intimidation efforts of defendants Rae and Hyman of SEC, see pg. 15-18 of 35 pg. complaint in record of Holmes vs. U.S. 231 FS 971, aff. ____ F2d ____, never denied by SEC. Petitioners believe their rights in Holmes vs. Eddy were prejudiced by '61 SEC counsel denial, threats and intimidations.

In view of the circumstances, the court in U.S. vs. Parrott, found prejudice in counsel lack:

"Willis and Holmes testified fully as adverse Government witnesses."

"Defendants Willis and Holmes appeared and testified without benefit of counsel"

Meanwhile, in November, 1963, the defendant SEC counsel David B. Bliss was engaged in a fraud and deceit upon the petitioners, see U.S. vs. Parrott:

"In connection with these same proceedings, a more significant action on the part of the Government is noteworthy. The SEC attorney (Bliss) denied that criminal proceedings had been instituted against any of the persons involved." Also, see Note 8, Parrott, Appendix B, to be reported by CCH F.S.L.R. at _____.

Judge Daugherty, petitioners have been informed, has never given anyone permission to open the sealed plans. Nor has the U.S. Court of Appeals, Tenth Circuit, signed any order allowing the court sealed plans to be opened.

However, in Fall of 1965, petitioners did discover that the ordered sealed court set of plans has been secured in some fashion (not lawful subpoena) by the defendants here Bliss and Hyman, SEC counsel, and one Barnes, a U.S. agent (for identification see footnote 7, U.S. vs. Parrott, and there appendix A, to be reported, CCH FSLR _____. participation in deceit).

Upon discovery of violation of the court order by defendants and one Barnes, petitioners moved for contempt in Hydramotive Mfg. Corp., et al vs. SEC, 10th Cir., No. 7977, appealed from SEC vs. Bond and Share, et al 229 F.S. 88. The interesting Bond and Share action, begun 12/13/'61, well-used by by SEC and U.S. as alleged "precedent", has bogged down completely to the prejudice of petitioners-here, defendants therein, due to court reporter administrative breakdown, see 10th Cir. opinion, cited in next paragraph.

In argument on Nov. 22, 1965, the Tenth Circuit indicated the contempt motion might better be heard in the district court and/or was premature to receipt of the appeal-in-chief, when and if the record is completed. In opinion of 1/3/'66, No. 7977, to be reported, ___ F2d ___, CCH FSLR at _____, the Tenth Circuit said:

> "..... denied as premature. The motion of the appellants Willis and Holmes relating to the disclosure of asserted confidential information by appellee through use of exhibits introduced at the trial of this action are denied for the same reason." (emphasis added, last 2 pages of 5 page opinion).

The petitioners urge that, as a matter of law, in view of the findings of U.S. vs. Parrott, they are entitled to suppress and recover their property, that is, both (1961 and 1963 taken) sets of automobile and tire plans, which application of law would quiet this dispute.

In No. 9543, Holmes vs. U.S., (4thCir.), the petitioners asked damages from the U.S. for the negligence of agents. See 9543 4thCir. appendix record pg. 2, "negligent acts" -- pg. 6 "negligent acts" -- pg. 9, "negligently intefere" -- pg. 11 "negligent fashion" -- pg. 14, "negligent acts".

Petitioners urge that, as a matter of law, in view of the U.S. vs. Parrott findings of negligence, they are entitled to pursue a claim of negligence under the Tort Claims Act.

In view of the Parrott case findings, see the Appendix A and B, to be reported CCH FSLR _____, the participation of defendants Bliss and Hyman in such fraud and deceit as noted, the petitioners urge that an action for individual damages be allowed against the guilty parties and those who acted in concert with them in such deceit, surely the type of "reckless or worse" conduct held to be culpable in Kelley vs. Dunne, 344 F2d 129.

The underlying decision was under Rule 56, where certain immunizing principles do not apply

to attorneys, see Moore's Federal Practice, Vol. 6, 2nd Ed., Affidavits in Bad Faith, Rule 56(g):

(page 2353..."Its (United States) attorney,could, however, be guilty of contempt since the clear language of 56(g) so provides and the immunizing principle of soverign immunity ... does not apply to him..." and "While Rule 56(g) provides for imposition of reasonable expenses (including attorney's fees) against only the offending party, his attorney is subject to a statutory liability for excessive costs, see 28 U.S.C. 1927."

In lieu of certiorari, petitioners urge that case No. 9543 be remanded to the district court for further findings of fact consistent with U.S. vs. Parrott.

Lastly petitioners urge that this court delay ruling on this petition for rehearing until the Court receives the indicated writ of certiorari in Holmes vs. U.S. 231 F.S. 971, affirmed 5thCir, No. 22052, 12/13/'65, ___F2d___, CCH FSLR _____, and Holmes vs. Cary, 234 F.S., affirmed 5thCir., No. 22098, ____F.2d____, CCH SLR _____, both expect to reach writ for certiorari in 60 days unless 5th Circuit rehearing granted.

Petitioners believe the summary opinions in these two cases do not adequately deal with the dozens of constitutional questions that may be raised by the hundreds of undisputed facts set forth in the hundreds of pages of reproduced records in these cases.

Petitioners urge that these two later cases, and the many issues raised in the lengthy complaints, dozens of pages of exhibits and affidavits be considered before ruling on this petition, in view of the U.S. claim this decision res judicata for Holmes vs. U.S., CA 5, or for the matter any litigation the petitioners have ever brought, and the same litigants being involved.

Petitioners urge that these three cases be considered together and that petitioners truly believe that these three cases reveal a vast pattern of governmental interference with their constitutional rights, as well as misguided conduct on the part of the U.S. Securities and Exchange Commission.

Respectfully submitted,

John V. Holmes, pro se
Durward E. Willis, pro se
Solo Tire Company
Hydramotive Corporation
Hydramotive Manufacturing Corp.
Hydramotive Engineering Corp.
American Uranium Company
Science Investors, Inc.
Data Electronics, Inc.
Hydramotive Financial Corp.
Willis Acceptance Corporation

January 28, 1966

Address for Petitioners:

Love Valley
North Carolina 28677

Certificate of Petitioner:

I, John V. Holmes, petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

John V. Holmes, Petitioner, pro se

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil Case File Number 9528

Securities and Exchange Commission Plaintiff vs. Bond and Share Corporation, et al Defendants.	ORDER

Upon Motion and Good Cause Shown,

All drawings, layouts, designs of the Hydramotive automobile are hereby ordered sealed and entrusted to the Clerk of this Court, to be opened only on order of the Court.

FRED DAUGHERTY

United States District Judge

Dated: Mar. 16, 1964

FILED

MAR 16 1964

VERA L. HOWARD

CLERK, U. S. DISTRICT COURT

By ALICE FAYE JOHNSON

DEPUTY

ATTEST: A True copy of the original Order.

VERA L. HOWARD Clerk.

By Alice Faye Johnson

Deputy

Appendix A

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